

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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BRIT FANUEL AUGBORNE, III,

Petitioner,

Case No. 2:19-cv-01204-KJD-BNW

ORDER

v.

BRIAN WILLIAMS, et al.,

Respondents.

Before the court is respondents' motion to dismiss Brit Fanuel Augborne, III's prose 28 U.S.C. § 2254 habeas corpus petition because the claims are unexhausted and/or conclusory (ECF No. 8). Augborne did not respond to the motion. As discussed below, the motion is granted in part.

I. Background & Procedural History

In November 2014, Augborne pleaded guilty to robbery with use of a deadly weapon (exhibit 23).¹ The state district court sentenced him to 4 to 12 years, with a consecutive term of 4 to 12 years for the deadly weapon enhancement. Exh. 38.

The Nevada Court of Appeals affirmed Augborne's conviction in 2016 and affirmed the denial of his state postconviction habeas corpus petition in 2019. Exhs. 74, 98.

¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 8, and are found at ECF Nos. 9-11, 13.

1 Augborne dispatched his federal habeas corpus petition for filing in June 2019
 2 (ECF No. 5). Respondents now move to dismiss certain claims in the petition as
 3 conclusory or unexhausted (ECF No. 8). Augborne has not responded to the motion to
 4 dismiss in any way.

5 **II. Legal Standards & Analysis**

6 **a. Exhaustion**

7 A federal court will not grant a state prisoner's petition for habeas relief until the
 8 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
 9 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
 10 courts a fair opportunity to act on each of his claims before he presents those claims in
 11 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also
 12 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
 13 petitioner has given the highest available state court the opportunity to consider the
 14 claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,
 15 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.
 16 1981).

17 A habeas petitioner must "present the state courts with the same claim he urges
 18 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
 19 constitutional implications of a claim, not just issues of state law, must have been raised
 20 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481
 21 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court
 22 must be "alerted to the fact that the prisoner [is] asserting claims under the United
 23 States Constitution" and given the opportunity to correct alleged violations of the
 24 prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*
 25 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)
 26 "provides a simple and clear instruction to potential litigants: before you bring any claims
 27 to federal court, be sure that you first have taken each one to state court." *Jiminez v.*
 28 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520

1 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,
 2 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”
 3 *Hiivala*, 195 F.3d at 1106. However, citation to state case law that applies federal
 4 constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir.
 5 2003) (en banc).

6 A claim is not exhausted unless the petitioner has presented to the state court
 7 the same operative facts and legal theory upon which his federal habeas claim is based.
 8 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
 9 exhaustion requirement is not met when the petitioner presents to the federal court facts
 10 or evidence which place the claim in a significantly different posture than it was in the
 11 state courts, or where different facts are presented at the federal level to support the
 12 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*
 13 v. *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
 14 458 (D. Nev. 1984).

15 **Ground 1**

16 Augborne asserts that the trial court coerced him into pleading guilty, in violation
 17 of his federal constitutional rights (ECF No. 5, pp. 3-5). Augborne did not present this
 18 claim to the highest state court. See exh. 66. Accordingly, ground 1 is unexhausted. PC
 19 appeal.

20 **Ground 2**

21 Augborne sets forth several claims of ineffective assistance of counsel (ECF No.
 22 5, pp. 7-12). He contends that:

23 2(a): trial counsel was ineffective for failing to ensure the guilty plea was accurate
 24 and that Augborne understood the plea;

25 2(b): trial counsel was ineffective for failing to raise an objection or to correct a
 26 mistake of law or fact regarding the guilty plea agreement;

27 2(c): trial counsel was ineffective due to a conflict of interest;

1 2(d): “conflict” counsel was ineffective for failing to investigate the facts of
 2 Augborne’s case and determining there was no basis to withdraw the guilty plea; and
 3 2(e): trial counsel was ineffective when he failed to object to going forward with
 4 sentencing.

5 Respondents argue that Augborne only raised ground 2(d) in his appeal of the
 6 denial of his state postconviction petition to the Nevada Court of Appeals. This court
 7 agrees that Augborne did not present grounds 2(a), (b), (c) or (e). See exhs. 92, 99.
 8 Thus, those claims are unexhausted. Respondents maintain that Augborne presented
 9 federal ground 2(d) to the Nevada Court of Appeals (ECF No. 8, p. 5). However, they
 10 provide no specific citation to petitioner’s appellate brief, and this court concludes that
 11 ground 2(d) is also unexhausted. 28 U.S.C. § 2254(b)(1)(A); see exhs. 92, 99.
 12 Accordingly, the entirety of ground 2 is unexhausted.

13 **b. Conclusory Claims**

14 In federal habeas proceedings, notice pleading is not sufficient. Mere
 15 conclusions of violations of federal rights without specifics do not state a basis for
 16 federal habeas relief. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). A petition may be
 17 summarily dismissed if the allegations in it are “vague, conclusory, palpably incredible,
 18 patently frivolous or false.” *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990)
 19 (internal citations omitted); see also *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

20 **Ground 3**

21 Here, Augborne states “This raised for the purpose that I may reserve the right to
 22 raise the issue to jurisdiction once I have the necessary information and transcripts from
 23 the court.” Augborne fails to present any discernible claim for relief or include any
 24 factual allegations. The court agrees with respondents that this ground is bare, vague,
 25 and conclusory and dismisses it on that basis.²

28 ² Respondents also point out that this claim is unexhausted.

III. Petitioner's Options Regarding Unexhausted Claims

A federal court may not entertain a habeas petition unless the petitioner has exhausted available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the court dismisses ground 3. The court further concludes that grounds 1 and 2 are unexhausted. Because the court finds that the petition contains only unexhausted claims, petitioner has these options:

1. He may return to state court to exhaust his unexhausted petition, in which case his federal habeas petition will be denied without prejudice;³ or

2. He may file a motion asking this court to stay and abey his unexhausted federal habeas petition while he returns to state court to exhaust his unexhausted claims.

A district court has discretion to stay a petition that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

544 U.S. at 277.

The Ninth Circuit Court of Appeals subsequently held that the *Rhines* stay-and-abeyance procedure is not limited to mixed petitions and that a district court may stay a

³ The court makes no assurances as to the timeliness of any future-filed petition.

1 petition that raises only unexhausted claims. *Mena v. Long*, 813 F.3d 907, 912 (9th Cir.
2 2016). If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance
3 in which he demonstrates good cause for his failure to exhaust his claims in state court
4 and presents argument regarding the question of whether or not the claims are plainly
5 meritless. Respondents would then be granted an opportunity to respond, and
6 petitioner to reply.

7 Petitioner's failure to choose one of the options listed above, or seek other
8 appropriate relief from this court, will result in his federal habeas petition being
9 dismissed. Petitioner is advised to familiarize himself with the limitations periods for
10 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations
11 periods may have a direct and substantial effect on whatever choice he makes
12 regarding his petition.

13 **IV. Conclusion**

14 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 8)
15 is **GRANTED** as follows:

16 Ground 3 is **DISMISSED**.

17 Grounds 1 and 2 are **UNEXHAUSTED**.

18 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** to either: (1)
19 inform this court in a sworn declaration that he wishes to dismiss this petition without
20 prejudice in order to return to state court to exhaust his unexhausted grounds; OR (2)
21 file a motion for a stay and abeyance, asking this court to hold his federal petition in
22 abeyance while he returns to state court to exhaust his unexhausted grounds. If
23 petitioner chooses to file a motion for a stay and abeyance, or seek other appropriate
24 relief, respondents may respond to such motion as provided in Local Rule 7-2.

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1 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
2 the time permitted, this case may be dismissed.

3 **IT IS FURTHER ORDERED** that respondents' motion for leave to file
4 presentence reports under seal (ECF No. 12) is **GRANTED**.

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7 DATED April 28, 2020



9 KENT J. DAWSON
10 UNITED STATES DISTRICT JUDGE

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